No. 85-803

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

JACK A. TURNER, *ET AL.*,*
Petitioners,

vs.

C F & I STEEL CORPORATION

and

NON-CONTRIBUTORY PENSION PLAN OF C F & I STEEL CORPORATION

and

THE PENSION PLAN OF C F & I STEEL CORPORATION

and

PROGRAM OF INSURANCE BENEFITS FOR EMPLOYEES OF C F & I STEEL CORPORATION OUTSIDE OF COLLECTIVE BARGAINING UNITS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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* The Names of all the Petitioners are set forth in the Appendix, Pages 1a-5a.

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Questions Presented for Review

I. Do retirees and participants of pension and welfare benefit plans have a right to a jury trial pursuant to the provisions of The Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132(a) ("ERISA")?

The Court of Appeals for the Third Circuit held that the Petitioners in their case do not have the right to a jury trial, which decision is in conflict with decisions of the Courts of Appeals for the Second Circuit and the Ninth Circuit.

II. Did the Trial Judge properly perform the judicial function when findings of fact in this non-jury trial were not determined by the Judge until 16 months after the trial and without a transcript of the testimony in this case?

III. Did the District Court and the Court of Appeals for the Third Circuit err in failing to conclude that granting increases in pension benefits under the plan to some retirees, while denying such benefits to other retirees in substantially similar circumstances improperly and unlawfully discriminated against Plaintiffs in violation of the pension plan and ERISA?

IV. Is the employer of a pension plan administrator liable for the statutory penalty under ERISA for failure to furnish plan documents to plan participants when the employer had the ultimate control of the plan administration?

V. Are medical and life insurance plans, employee benefit plans covered by the provisions of ERISA?

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Opinions Below

Petitioners, who are the Plaintiffs in this case, are all former non-union employees of the Respondent, C F & I Steel Corporation.

The District Courts' Findings of Fact and Conclusions of Law, and Order dated January 9, 1984 are unreported and reprinted in the Appendix at pages 6a to 37a.

The Opinion of the Court of Appeals for the Third Circuit dated August 14, 1985 is reported at 770 F. 2d 43 (3rd Cir., 1985) and reprinted in the Appendix at pages 38a to 51a.

Statement of Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Jurisdiction in the District Court was based on Section 502(e) of the Employee Retirement Income Security Act of 1974 29 U.S.C. §1132(e) ("ERISA"). Turner *et al.* appeal to the Court of Appeals for the Third Circuit was pursuant to 28 U.S.C. §1291.

Constitutional and Statutory Provisions Involved

Constitution: U.S. Constitution, Seventh Amendment (Appendix, p. 54a).

Statute: The Employee Retirement Income Security Act of 1974, Section 501(a) 29 U.S.C. §1132(a) (Appendix, p. 55a) and Section 501(c) 29 U.S.C. §1132(c) (Appendix, p. 56a).

Statement of the Case

This action was commenced on November 12, 1977, by 216 named Plaintiffs[1] against their former employer, C F & I Steel Corporation against two Pension Plans administered, operated and maintained by C F & I, the Non-Contributory Pension Plan of C F & I Steel Corporation ("Non-Contributory Plan"), and The Pension Plan of C F & I Steel Corporation ("Master Plan"), and against an employee welfare plan entitled Program of Insurance Benefits for Employees of C F & I Steel Corporation Outside of Collective Bargaining Units ("PIB"). The action was brought under and pursuant to provisions of Section 502 of the Employees' Retirement Income Security Act of 1974, 29 U.S.C. §1132 ("ERISA" herein).

On October 3, 1978, Defendants' filed pre-trial motions to dismiss the Complaint for improper venue, lack of personal jurisdiction, failure to state a claim against the Defendants and for failure to join an indispensable party. On February 8, 1981, 22 months after argument, District Court Judge Norma L. Shapiro entered an Order denying in part and granting in part the Defendants' pre-trial motions. On July 15, 1981, the District Court granted Defendants' Motion to strike Plaintiffs' demand for jury trial. A non-jury trial on the issues of liability was held before Judge Norma L. Shapiro on August 24, 25 and 26, 1982. On January 9, 1984, 16 months after the trial and without the benefit of a transcript of the testimony Judge Shapiro entered the Findings of Fact, Conclusions of Law and Order in favor of Defendants and against Plaintiffs.

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[1] For convenience, the parties are referred to as they were in the courts below, *i.e.*, as plaintiffs and defendants.

1. The Pension Plan

The Plaintiffs, who are all retired non-union employees of C F & I or the surviving spouses of such former employees, contend that they were unlawfully and improperly discriminated against when increases in pensions were granted to certain former non-union employees of C F & I in circumstances similar to the Plaintiffs, purportedly under the Master Plan, but denied to the Plaintiffs on the basis that they were under a different pension plan (*i.e.* Non-Contributory Plan). Plaintiffs contend that there was, in fact and in law, one pension plan applicable to all non-union employees of C F & I and that, when C F & I amended the Plan to grant increases in pension benefits, such increases in benefits must be granted to all former non-union employees under the Plan. Although certain documentary evidence relied upon by the courts below tend to show that C F & I maintained mutually exclusive pension plans, the substantial testimony of numerous witnesses and other documentary evidence shows that for more than 20 years C F & I by its conduct and actions treated their retirement program for all of their non-union employees as being one plan.

Plaintiffs asserted that the action of C F & I of granting increases in pension benefits to some former non-union employees in circumstances substantially similar to the Plaintiffs while denying the same benefits to Plaintiffs under the pension plan or program, was arbitrary and capricious and thereby violated the fiduciary standards of ERISA.

Plaintiffs further contended that they are entitled to recover under a contractual theory that when C F & I granted increases in pension benefits to certain former employees in substantially similar circumstances with

the Plaintiffs but denied such increases in benefits, it waived the condition or any requirement of the unilateral employment contract relating to separate benefit plans or benefits for employees in similar circumstances.

Plaintiffs also asserted the theory of promissory estoppel as a basis for recovery, that the actions, conduct and representations of C F & I in treating all non-union employees the same with respect to the pension program up to June, 1984, when it closed the Roebling facilities, constituted representations made by C F & I to its employees which they relied upon to their detriment.

The trial Judge's determination of the important fact that there were separate pension plans maintained by C F & I did not give proper consideration to all of the evidence presented in this case because she made such findings 16 months after the trial without a transcript of the testimony.

2. Plaintiffs' Claim for Increase in Insurance Benefits.

Plaintiffs contended that they were unlawfully and improperly discriminated against when increases in insurance benefits were granted to certain former non-union employees of C F & I, but denied to the Plaintiffs. Plaintiffs further contended that when the Plan entitled "Program of Insurance Benefits for Employees of C F & I Steel Corporation Outside of Collective Bargaining Units" ("PIB" herein) was amended after June 1, 1974, to increase certain insurance benefits for certain pensioners under the PIB Plan. Plaintiffs assert that there was only one PIB for all retirees who worked in the Roebling Division. Therefore, any changes in the PIB applied to all participants of the PIB, including the Plaintiffs.

The District Court determined that increases in hospital and life insurance to former employees retired under the Master Plan, but not to employees retired under the Non-Contributory Plan, are not in violation of ERISA, since medical and life insurance are ancillary benefits which may be forfeited without violating ERISA.

3. Statutory Penalty for Failure to Furnish Documents.

Plaintiffs contended that C F & I is liable to them for the statutory penalty under Section 501(c) of ERISA because C F & I failed to furnish to them certain requested documents and information. The District Court held that C F & I is not liable for this penalty under ERISA because it designated one of its employees as the Plan Administrator and he alone can be liable for such penalty.

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT

I. Retirees and Participants of Pension and Welfare Benefit Plans Have a Right to a Jury Trial Under ERISA.

The Court of Appeals for the Third Circuit in affirming the District Court's Order denying Plaintiffs' request for a jury trial stated that it is in agreement with those Courts of Appeals which have held that no jury trial is required in suits under Section 502(a)(1)(B) of ERISA by a beneficiary or participant against a trustee. However, the Court of Appeals for the Third Circuit recognized in its Opinion that there are conflicts in this matter in other Courts of Appeals.

This case was brought under Section 502 of ERISA which in relevant part provides as follows:

> "(a) Persons empowered to bring a civil action. A civil action may be brought:
>
> (1) by a participant or beneficiary—
>
> * * * * *
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> * * * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title of the terms of the plan; . . . ."

The right to a jury trial is derived either directly from the Statute (ERISA), or from the Seventh Amendment to the Constitution of the United States.

There is nothing in ERISA that expressly refers to a jury trial. However, in the case of *Stamps v. Michigan Teamsters Joint Council No. 43*, 431 F. Supp. 745 (1977), the United States District Court for the Eastern District of Michigan held that jury trial was available because Section 502 of ERISA sets forth, in the alternative, two remedies, only one of which provides explicitly for equitable relief, §502(a)(3); and, therefore, to avoid rendering superfluous the other remedy, §502(a)(1)(B), the Court reasoned that the other remedy must have been intended by Congress to be legal in nature and thus determinable by jury trial.

The United States Court of Appeals for the Second Circuit has also spoken on this issue. First, it affirmed without opinion a case from the United States District Court for the Southern District of New York which had stated that whether a plaintiff is entitled to additional monies from a benefit plan is a legal question to be submitted to a jury. *Pollock v. Castrovinci*, 476 F. Supp. 606 (S.D.N.Y. 1979), *Aff'd* 622 F.2d 575 (2d Cir. 1980). In the case of *Katsaros v. Cody*, 744 F.2d 270 (2d Cir. 1984), *cert. denied* _____ U.S. _____, 105 S. Ct. 565 (1984), which was an ERISA action seeking the removal of trustees and restitution, the Court held there was no right to a jury trial since the plaintiffs were seeking equitable relief. However, the Court stated in its Opinion that "the plaintiffs seek equitable relief in the form of removal and restitution as distinguished from damages for wrongdoing or non-payment of benefits[,]" *id.* at 278, indicating that someone seeking additional monies from a benefit plan may indeed have a legal claim and a right to a jury trial in the Second Circuit.

The legislative history of ERISA supports the position that a right to a jury trial is available under Section 502. The Joint Explanatory Statement of the Committee of Conference reads, in relevant part, as follows:

> "All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under Section 301 of the Labor-Management Relations Act of 1947."
>
> H.R. Conf. Rep. No. 93-1280, 93rd Cong. 2d Sess. of 1974 U.S. Code Cong. & Ad. News pp. 5038, 5107
>
> (See *Stamps v. Michigan Teamsters Joint Council No. 43, supra;* and *Pollock v. Castrovinci, supra*)

Under Section 301 of the Labor-Management Relations Act of 1947, an employee who sues for money damages under a collective bargaining agreement is entitled to a jury trial upon request. See *Allen v. United Mine Workers of America*, 319 F.2d 594 (6th Cir. 1963); *United Electrical R. & M. Workers v. Oliver Corp.*, 205 F.2d 376 (8th Cir. 1953); *Bugher v. Frightner*, 722 F.2d 1356 (7th Cir. 1983).

In the case of *Peckham v. Board of Trustees, etc.*, 653 F.2d 424 (10th Cir. 1981), an action by participants against a pension fund for certain pension benefits, the case was tried to a jury on two principal theories: (a) that the pension fund acted arbitrarily in classifying them as non-employee/participants; and (b) that the plan documents did not meet ERISA standards of clarity as to the ineligibility of employees. The Court of Appeals reversed the judgment on the verdict for the claimants, holding that the actions of the trustees were not arbitrary and capricious as a matter of law. The Court of Appeals in a footnote stated that at least two circuits have held that ERISA does not grant litigants a right to trial by jury.

In *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1964), that Court noted that the plaintiffs' ERISA claim for wrongful denial of benefits preempted their six common law theories of liability and, in addressing the trial judges' decision to strike the plaintiffs' demand for a jury trial, the Court stated the decision would be reversed upon a showing of abuse of discretion. But it made that statement without any discussion of or citation to the conflicting decisional law on the right to jury trial in ERISA cases.

The reasoning in the *Stamps* and *Pollock* cases was rejected by the United States Court of Appeals for the Seventh Circuit in *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). The Court in that case decided that the remedy provided in Subsection 502(a)(1)(B) need not be regarded as legal to avoid superfluity because even if 502(a)(1)(B) and 502(a)(3) both provided solely for equitable relief, they would still have to be in separate subsections as a consequence of their differing jurisdictional provisions, the former allowing for concurrent state and federal jurisdiction, the latter vesting jurisdiction exclusively in the Federal Courts. *Calamia v. Spivey*, 663 F.2d 1235 (5th Cir. 1980), adopted *Wardle's* reasoning and held that lacking any clear congressional intent, the Court should be guided by previous cases which considered such claims by pension beneficiaries as equitable. To the same effect, see *Berry v. Ciba-Geigby Corporation*, _____ F.2d _____, No. 84-1473 (4th Cir. May 13, 1983); *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982).

It is submitted that if the right to a jury trial is not derived from ERISA, it is available under the Seventh Amendment which provides that "In suits at common

law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This right extends to modern statutory actions if the action involves rights and remedies of the sort traditionally enforced in an action at law. *Curtis v. Loether*, 415 U.S. 189 (1974). Of importance in ascertaining the character of a statutory action is the nearest historical analogue. *Pernell v. Southall Realty*, 416 U.S. 363 (1974).

Under the law of trusts, there is a recognized exception to exclusive equitable jurisdiction over trusts and trustees. Where a trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment. *Restatement (Second) of Trusts*, 197-198 (1959). In the case of *Ovitz v. Jeffries & Company, Inc.*, 553 F. Supp. 300 (N.N. Ill., 1982), it was held that when an ERISA claim is based on an unconditional and immediate obligation to pay certain amounts, then the claim is legal and a jury demand proper. See A. Bogert, *Trusts and Trustees*, (Rev. 2d Ed., 1982, p. 870).

The nature of the Petitioners' principal claims in the present case are for additional monthly pension benefits in liquidated sums which are unconditional and immediate obligations. Therefore, since the Petitioners' central claims are legal in nature, for which there is an adequate remedy at law, they are entitled to a jury trial.

II. The Trial Judge Did Not Properly Perform the Judicial Function of Determining Findings of Fact in this Non-Jury Trial.

This case, which was tried as a non-jury trial, involved important factual issues determined by the Trial Judge based upon a substantial amount of testimony and documentary evidence. The evidence presented at the trial involved the operation and administration of the pension and welfare plans at issue in this case.

The trial occurred August 24, 25 and 26, 1982, but the Judge's decision was not entered until 16 months later, on January 9, 1984. The Judge made the decision in this case 16 months after the trial and without reviewing the record in the case, because the testimony was not transcribed until after the appeal was filed in the Court of Appeals. The Trial Judge's staff filed with the documentary evidence in the record of this case an office memorandum from the Trial Judge's law clerk to the Trial Judge dated December 22, 1983, purporting to analyze the facts and legal issues in this case (a copy of this memorandum is included in the Appendix at Pages 52a-53a). This memorandum clearly shows that the Trial Judge was considering the evidence in this case 16 months after the non-jury trial. The law clerk's memorandum, which was obviously relied upon by the Trial Judge in making the decision, shows an erroneous analysis of the facts and law and a reference to a "record" which did not exist. Furthermore, although the parties filed pre-trial memorandums, there were no post-trial arguments or briefs submitted in this case.

The failure of the Trial Judge to give careful and proper consideration to the evidence and factual findings is an important consideration for an appellate court in applying the clearly erroneous rule of Fed. R. Civ. P. 52(a) (See *Roberts v. Ross*, 344 F.2d 747 (C.A. 3rd, 1965); *Louis Dreyfus & Cie v. Panama Canal Co.*, 298 F.2d 733

(C.A. 5th, 1962)). In *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252 (C.A. 5th, 1980), *cert. den.* 449 U.S. 899, it was stated that an appellate court can take into account the lower court's lack of personal attention to factual findings in applying the clearly erroneous rule and that the appellate court can feel more confident in concluding that important evidence may have been overlooked or inadequately considered when factual findings were not the product of personal analysis and determination by the trial judge.

The Supreme Court, in defining what is meant by "clearly erroneous", which has been reiterated many times by the Court and the Court of Appeals, stated:

> "A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364 (1948).

The Court of Appeals did not refer to this issue except in a footnote which stated as follows:

> "1. The plaintiffs also complain of the district court's tardiness in filing its findings of fact and conclusions of law. Although this case could have been handled with more dispatch, we find no prejudice that requires reversal."

The Court of Appeals stated that the findings of fact by the Trial Judge were not clearly erroneous because they were supported by the documentary evidence. This opinion by the Court of Appeals completely disregards three days of oral testimony concerning the nature and operation of the pension and welfare plans.

It is therefore submitted that the Trial Judge's failure to properly perform the judicial function of determining the findings of fact in this non-jury trial was very prejudicial to the Plaintiffs.

III. The District Court and the Court of Appeals for the Third Circuit Erred in Failing to Conclude that Granting Increases in Pension Benefits Under the Plan to Some Retirees, While Denying Such Benefits to Other Retirees in Substantially Similar Circumstances, Improperly and Unlawfully Discriminated Against Plaintiffs in Violation of the Pension Plan and ERISA.

The District Court's decision, which was affirmed by the Court of Appeals for the Third Circuit, was based upon findings of fact which did not give consideration to the entire record in this case. There was substantial testimony presented during three days of trial, most of which was uncontested and some of which was from Defendants' witnesses, which showed that the Defendants discriminated against the Plaintiffs under the C F & I pension programs. This evidence was not considered because the Trial Judge made the findings of fact 16 months after the trial, without any transcript of testimony or post-trial briefs by the parties.

IV. The Employer of a Pension Plan Administrator is Liable for the Statutory Penalty Under ERISA for Failure to Furnish Plan Documents to Participants When the Employer Had the Ultimate Control of the Plan Administration.

The District Court, in its Order dated February 6, 1981, dismissed Count II of the Plaintiffs' Complaint which alleged that C F & I violated Section 501(c) of ERISA by failing to furnish certain requested pension documents and that C F & I is liable to them for the statutory penalty. The District Court held that C F & I was not the Plan Administrator and that C F & I's employee, Vincent Galvin, as the Plan Administrator, was the only one who could be liable for the statutory

penalty. The Court of Appeals for the Third Circuit affirmed this holding and stated that the Plaintiffs should have directed their inquiries to the Plan Administrator, which is what the Plaintiffs did.

In *Hales v. Winn-Dixie Stores*, 500 F.2d 836 (4th Cir. 1974), the employer was held to be an administrator when the employer was the person "with responsibility for the ultimate control, disposition or management" of fund moneys within the meaning of the Pension Plan Disclosure Act, 29 U.S.C. §§304(b), 308(b). Also, in *Hardy, et al. v. H.K. Porter Company, Inc.*, 417 F. Supp. 1175 (E.D. Pa. 1976) *Aff'd* 559 F.2d 1208 (3rd Cir. 1977), the Court attributed the actions of the pension committee which administered the pension plan to the employer since the employer had ultimate control of all pension matters.

It is clear in this case that C F & I and not an individual employee of C F & I had the ultimate control, management and operation of the pension plan.

V. Medical and Life Insurance Benefit Plans are Considered Employee Benefit Plans and Covered by the Provisions of ERISA.

The District Court held that medical and life insurance are "ancillary benefits which may be forfeited without violating ERISA". The Court of Appeals for the Third Circuit, in affirming the judgment of the District Court, did not mention this issue.

C F & I established and maintained an employee welfare benefit plan entitled "Program of Insurance Benefits for Employees of C F & I Steel Corporation Outside of Collective Bargaining Units" ("PIB", herein) for its employees. C F & I distributed from time to time to its non-union employees, including the Plaintiffs,

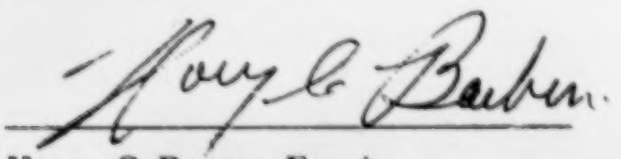
various documents and booklets explaining the benefits of the PIB. After July 1, 1974, C F & I amended the PIB and commenced providing to all pensioners under age 65 purportedly retired under the Master Plan medical care insurance at no cost to the retiree. This benefit was not provided to the Plaintiffs who purportedly retired under the Non-Contributory Plan, although PIB made no distinction among employees with respect to what pension plan covered them. Retirees who worked at Roebling and retired under the Master Plan received the increased benefits, while the retirees from Roebling retired under the Non-Contributory Plan did not receive such increased insurance benefits.

The District Court's holding that medical and life insurance are "ancillary benefits which may be forfeited without violating ERISA" is an erroneous holding under the law. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al. v. Cadillac Malleable Iron Company, Inc.*, 728 F.2d 807 (6th Cir. 1984), the Court held that life insurance and hospital and health insurance benefits of retired employees became vested when the employee's service was performed. (Also see *International Union, et al. v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied* _____ U.S. _____, 104 S. Ct. 1002 (1984)). Medical and hospital benefit plans are considered employee benefit plans and included under ERISA.

Conclusion

For the reasons stated above, Petitioners, Jack A. Turner, *et al.* respectfully request this Honorable Court to grant their Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



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APPENDIX A

Names of Petitioners

JACK A. TURNER, NORMA L. ABBOTT, DOROTHY Y. ADAMS, STEPHEN A. AGOES, BERNARD ALLEGRETTI, BLANCHE A. ALLEN, ADAM ANDEL, JR., PHILIP A. ANDERSON, OLIVE V. APPLEGATE, MICHAEL BACHIK, WILLIAM J. BALLA, CHARLES G. BENNIGHOFF, JR., HERBERT W. BERGLUND, BLAIR BIRDSALL, JOHN W. BLAKESLEE, JOSEPH J. BODNAR, R. GARRETT BOETSMA, CATHERINE A. BOLAND, LOUIS BOLDIZAR, EDWIN P. BOYER, C. LEE BOYLE, JR., WILLIAM F. BREZA, CHARLES J. BRIEL, JR., ARTHUR BRODOWSKI, EDWARD H. BROWER, HARRY E. BROWN, JR., H. RUSSELL BROWN, JOSEPH A. BRUNI, ALTON M. BUCHANAN, CHARLES H. BURDEN, FRANK BUREK, EDWARD L. BURKHARDT, MARIE K. BURKHARDT, FRED BURKLEY, JR., FOREST S. BURTCH, SILVIO F. CAPRITTI, RAYMOND A. CARTY, RICHARD F. CAZIN, LOIS M. CLAYTON, GROVER B. CLOSSON, MARGARET D. COUTIER, HOMER DELORME, JAMES J. DENNION, III, KINSEY S. DICKEL, LORETTA DiLULLO, PHILIP F. DiPAOLA, RITA T. DiPAOLA, JOHN A. DYOTT, EDWARD W. EGAN, RUTH C. EGAN, PAUL ENGLUND, HENRY PAUL EVANS, ANTHONY A. FARKAS, A. BEATRICE FORD, STANLEY FORS, JEAN FRASCELLA, JOHN L. FRATTICCIOLI, FREDERICK A. FRENCH, RICHARD H. FRIDINGER, HERBERT C. FUES, SR., WILLIAM C. FUNK, EVERETT K. GILBERT, HOWARD J. GODFREY, CHARLES C. GOLDENBAUM, RUTH M.

Appendix A—Names of Petitioners.

GRAINGER, EMMA P. GREEN, WALTER F. GUTERMUTH, MYRTLE W. HAMPTON, WILLIAM K. HANNA, STELLA M. HARBOURT, JAMES E. HARPER, WALTER H. HARTMANN, G. KNIGHT HAYES, ANTHONY P. HIEL, EMMA M. HENDERSON, GERTRUDE M. HENRY, JOHN M. HERRMANN, RUDOLF H. HERTZOG, LLOYD E. HILL, HAROLD W. HILLS, SR., WALTER S. HOECHST, MARY K. HOFFMAN, JOSEPH HORESKO, JOSEPH G. HOTTINGER, CHARLES JACOBS, STEPHEN KATALA, ALEXANDER A. KERR, NAOMI L. KERR, JOHN H. KESSLER, MARY J. KILLILEA, EUGENE KING, ALEXANDER KISH, MADELINE C. KOENIG, HAROLD L. KOMOSKI, MARY FLORA KONDASH, FRANKLIN LeMUNYON, HARRY LEOPOLD, JR., DARTREY LEWIS, FRED M. LINDA, ROBERT J. MacDANIEL, MARGARET MAGYAR, NICHOLAS L. MAGYAR, JOHN MAJOROS, MARGARET M. MALONE, HOWARD E. MALONEY, NORMA C. MARJARUM, JULIUS MATE, JR., GREGORY J. McDERMOTT, WALTER W. McDERMOTT, ALEXANDER D. McDOWALL, WILLIAM G. McGOUGH, ALFRED F. MEGER, JOSEPH MEGULES, ANASTAZIA S. MELVILLE, HAROLD MILLER, JR., ALFRED MORGAN, WILLIAM J. NAY, ELIZABETH C. NEMETH, JOHN E. NIXON, M. JOSEPH OLAFSON, CHARLES E. PALMER, CHRISTIAN L. PATRICK, A. LESTER PATTERSON, LeROY H. PATTERSON, WILLIAM L. PATTERSON, STEPHEN PENTEK, FRANCIS O. PERRY, DONALD R. PETTY, THOMAS G. PIERSON, WILLIAM PITKO, MALCOLM POLLOCK, H. KENT PRESTON, P. PAUL RANTO,

Appendix A—Names of Petitioners.

SR., HERBERT D. RATHBUN, JOHN F. REED, ELLA G. REEGER, LOUISE T. REESE, PAUL B. REISINGER, FRANK J. RESCH, WILLIAM C. RIDGE, CHESTON B. ROBBINS, LEON ROHRBACHER, JOHN SABO, JR., CHESTER A. SAJESKI, ANDREW E. SARY, EDGAR W. SCHINDEWOLF, JOHN W. SCHLEGEL, JR., RUDOLPH K. SCHLEGEL, LENA SCHMELTZ, ALBERT J. SCHULZ, ALBERT E. SCHUNDER, ANNA M. SEIDENGLANZ, RADER J. SEYLER, HELEN R. SMITH, CLARENCE W. SNYDER, STEPHEN R. SOPKO, GRACE M. SORTER, WILLIAM H. SPENCER, EMIL H. SPILLMAN, STEVEN V. SPIRITO, PAUL H. STARK, ALICE P. STEVENS, MATTHEW E. STIRLING, JAMES P. SZATHMARY, ISAAC I. TANTUM, STANLEY E. TANTUM, CHARLOTTE D. TOTH, PAUL S. TOTH, ROBERT F. TYRRELL, F. TITUS UPDIKE, WILLIAM VITO VASTI, JEAN C. VERNON, ERMA VOORHEES, IRVING C. WALL, KENNETH R. WARRACK, GEORGE WASKO, ROSEMARY M. WEBER, WALTER F. WEBER, EMERSON V. WILKINS, IRMA M. WILSON, PETER F. WILWOL, MELVIN B. WINNER, HARRY P. WOLFINGER, FRANK A. YEAGER, M. DORIS ZAHORSKI, ELIZABETH C. NEMETH, Executrix of Estate of Joseph R. Nemeth and individually as surviving spouse, HELEN POTKAY, Executrix of Estate of JOSEPH F. POTKAY and individually as surviving spouse, JULIA RESCH, Executrix of Estate of Stefan Resch and individually as surviving spouse, and EDITH YAEGER, Executrix of Estate of Otto Yaeger, Jr. and individually as surviving spouse, THOMAS BARRY, Personal

Appendix A—Names of Petitioners.

Representative of Francis Barry, Deceased, ADELMA I. BLYTHE, surviving spouse of J. Gardner Blythe, Deceased, MARGARET E. BORDEN, Individually in her own right and as surviving spouse of Richard W. Borden, Deceased, DOROTHY BURKHAUSER, Individually in her own right and as surviving spouse of Valentine C. Burkhauser, Deceased, LEWIS PARKER, Personal Representative of Frederick G. Cartlidge, Deceased, EDITH C. DAWSON, Personal Representative of Alfreda Craft, Deceased, MRS. JAMES BARRETT, Personal Representative of Anne C. Engemann, Deceased, MARTHA E. THOMAS, Personal Representative of Marie A. Farley, Deceased, BARBARA FERRANTE, Individually in her own right and as surviving spouse of Joseph M. Ferrante, Deceased, HAROLD G. HARTMAN, Personal Representative of E. George Hartmann, Deceased and HELEN M. HARTMANN, Individually and in her own right as surviving spouse of E. George Hartmann, Deceased, DOUGLAS GUYER, Personal Representative of C. Richard Hill, Deceased, SYLVIA HOLLENBECK, Surviving Spouse of Luther G. Hollenbeck, Deceased, NEW JERSEY NATIONAL BANK, Personal Representative of Herbert S. Hunt, Deceased, HELEN L. KERR, Individually in her own right and as surviving spouse of Earl S. Kerr, Deceased, HELEN LEX, Individually in her own right and as surviving spouse of W. Irving Lex, JEAN M. McCOY, Surviving spouse of John J. McCoy, Deceased, ROBERT MEYEREND, Personal Representative of Frank M. Meyerend, Deceased, JACK NOBLE, Personal Representative of J. Henry Noble, Sr., Deceased, JANET PACENTA, Surviving spouse of Daniel Pacenta, Deceased, MARY

Appendix A—Names of Petitioners.

PAGLIONE, Individually in her own right and as surviving spouse of Pasquale R. Paglione, Deceased, WANDA G. ROBISON, Individually in her own right and as surviving spouse of Frank P. Robison, Deceased, FRANCES BRODOWSKI, Individually in her own right and as surviving spouse of Leon W. Brodowski, Deceased.

APPENDIX B

United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

JACK A. TURNER, *et al.*,

vs.

CF&I CORPORATION and NON-CONTRIBUTORY PENSION PLAN OF CF&I STEEL CORPORATION and THE PENSION PLAN OF CF&I STEEL CORPORATION.

CIVIL ACTION
NO. 77-3916

Entered: 1/10/84
Clerk of Court

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NORMA L. SHAPIRO, *J.* January 9, 1984

This is an action under the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1461 (Supp. 1982), commonly known as ERISA. Jurisdiction is predicated upon 29 U.S.C. §1132(a) and (e). Plaintiffs, two hundred and sixteen former employees and current pensioners of the Non-Contributory Pension Plan of CF&I Steel Corporation (CF&I), bring this action against

that company, as well as both the Non-Contributory Pension Plan (Non-Contributory Plan) and the Pension Plan of CF&I Steel Corporation (Master Plan); they allege violations of ERISA, the Securities and Exchange Act of 1934, 15 U.S.C. §78j(b), and the Securities Act of 1933, 15 U.S.C. §77g(a).

Count One alleges that the Non-Contributory Plan and the Master Plan were in fact one Plan; and that prior to August 1, 1975 all terms and conditions, all amendments made, and all increases in benefits were substantially the same for both Plans. It is alleged that, on that date and thereafter, increases in pension benefits were granted employees retired under the Master Plan but were not granted to plaintiffs, who were all retired under the Non-Contributory Plan. Plaintiffs aver that they are entitled to the same increases as the Master Plan retirees under the terms of the plans and the provisions of ERISA.

Count Two, naming CF&I only, alleges that CF&I violated Sections 104 and 105 of ERISA, 29 U.S.C. §1024, 1025, by failing to provide certain documents and information concerning the pension plans to plaintiffs' attorney upon request. Plaintiffs seek the statutory penalty provided in Section 502(c) of ERISA, 29 U.S.C. §1132(c).

In Count Three, naming CF&I only, plaintiffs allege that CF&I established a Hospital and Medical Insurance Plan and a Life Insurance Plan under which plaintiffs were entitled to certain benefits. Plaintiffs assert that CF&I granted increased benefits under those plans to similarly situated retirees but not to them, in violation of ERISA.

Appendix B--United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

In Count Four, naming all defendants, plaintiffs seek the award of reasonable attorney fees and costs of the action under Section 502(g) of ERISA, 29 U.S.C. §1132(g).

In Count Five, plaintiffs allege that defendants CF&I and both plans reduced the pension benefits of certain of the plaintiffs in retribution for the instant action. Plaintiffs claim this action constituted interference with their rights under Section 510 of ERISA, 29 U.S.C. §1140.

Finally, in Count Six, plaintiffs allege that the three defendants violated Section 10b of the Exchange Act, 15 U.S.C. §78j(b), Rule 10b-5 thereunder, and Section 17(a) of the Securities Act, 15 U.S.C. §77g(a) by making misrepresentations and omissions of material facts concerning the increases in pension benefits to which plaintiffs would be entitled.

The case proceeded to trial solely on Counts I, III and V.[1] The parties entered into a stipulation of facts in connection with defendant's pretrial motions, but reserved the right to supplement the record at trial. Following a bench trial, the court makes these findings of fact and conclusions of law as required by Fed.R.Civ.P. 52(a):

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[1] In a prior Memorandum and Order, this Court dismissed Counts II and VI for failure to state a claim. We also found that venue was properly laid in this district pursuant to 29 U.S.C. §1132(e)(2), that personal jurisdiction existed over the defendants, and that defendants were properly served pursuant to 29 U.S.C. §1132(d)(1). The court denied CF&I's motion to dismiss for failure to join an indispensable party and, pursuant to this Court's order, plaintiff joined the Program of Insurance Benefits for Employees of CF&I Steel Corporation Outside of Collective Bargaining Units as a defendant in Count III.

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

FINDINGS OF FACT

1. CF&I Steel Corporation ("CF&I") is a Colorado corporation having its principal office at 215 Canal Street, Pueblo, Colorado. CF&I is registered to do business in Pennsylvania, and its registered office is the office of C T Corporation System, 123 South Broad Street, Philadelphia, Pennsylvania.

2. The Non-Contributory Pension Plan of CF&I Steel Corporation ("Non-Contributory Plan") is an employee pension benefit plan maintained and sponsored by CF&I. The written terms and conditions of the Non-Contributory Plan, as amended effective January 1, 1976 are set forth in Exhibit 1.

3. The Pension Plan of CF&I Steel Corporation ("Master Plan") is an employee pension benefit plan maintained and sponsored by CF&I. The written terms and conditions of the Master Plan, as amended effective January 1, 1976, are set forth in Exhibit 2.

4. The Non-Contributory Plan was established on July 1, 1940 by John A. Roebling's Sons Corporation. CF&I acquired John A. Roebling's Sons Corporation ("Roebling's") in 1952, at which time Roebling's owned and operated manufacturing plants and offices in Trenton and Roebling, New Jersey, and warehouses and sales offices in certain other states. A Plan had existed in some form since the 1920's. After CF&I acquired John A. Roebling's Sons Corporation, it maintained the Non-Contributory Plan which was amended and restated many times thereafter. Plaintiffs are all former non-union employees of CF&I, or the beneficiaries of deceased former non-union employees of CF&I, who were

employed at facilities of the Roebling Division of CF&I on or before June 30, 1962 and are receiving pension benefits under the Non-Contributory Plan.

5. On March 1, 1950, CF&I established the Master Plan which was amended and restated many times thereafter.

6. Since October 1, 1967, Marine Midland Bank of New York ("Marine Midland") has been the trustee of each of the trusts forming a part of the Non-Contributory Plan and the Master Plan, respectively. From at least January 1, 1960 until September 30, 1967, the First Pennsylvania Banking and Trust Company ("First Pennsylvania"), located in Philadelphia, Pennsylvania, has been the trustee of the trust forming part of the Non-Contributory Plan. Sometime in 1980, the Mellon Bank of Pittsburgh, Pennsylvania, became Trustee and is now presently trustee for both plans.

7. CF&I has made and makes certain contributions to the trustee of the trusts forming part of the Non-Contributory Plan and the Master Plan, respectively, to provide for the current and future costs of the pension benefits payable under the terms of each of those plans.

8. In April, 1973, CF&I terminated the operations of and closed the Trenton facilities and on June 30, 1974, it terminated the manufacturing operations of the Roebling facilities. From June 30, 1974 until December 31, 1974, closing down activities with respect to the Roebling facilities were carried on by CF&I in New Jersey; thereafter, all operations of the Roebling facilities were terminated. At various times since 1952 and prior

to June 30, 1974, CF&I had terminated the operations of and had closed other facilities of the former John A. Roebling's Sons Corporation outside of New Jersey.

9. Since 1969, when Crane Co. acquired more than 80% of the issued and outstanding stock of CF&I, CF&I has been a subsidiary of Crane Co. Crane Co. has its principal offices at 300 Park Avenue, New York, New York, and presently owns over 90% of outstanding CF&I stock.

10. With leave of Court, plaintiffs amended the complaint joining the "Program of Insurance Benefits for Employees of CF&I Steel Corporation Outside the Collective Bargaining Units" as a defendant in Count III.

11. CF&I distributed, at various times, documents and booklets explaining pension plan benefits; the last booklet regarding the Non-Contributory Plan as amended July 31, 1972 is shown by Exhibit P-A. A booklet distributed to members of the Master Plan, entitled "The Pension Plan of CF&I Steel Corp. as Amended July 31, 1972" is shown in Exhibit B.

12. Section 9 of the written terms and conditions applicable to the Non-Contributory Plan contains provisions relating to the administration of that Plan (Exhibit 1, pp. , Paragraph 9.7 thereof provides that:

> "The Company may:
>
> "(a) appoint an Administrator of the Plan who shall perform those functions required of an Administrator under the Employee Retirement Income Security Act, as well as those properly delegated to him by the Company . . . ."

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

13. Section 9 of the written terms and conditions applicable to the Master Plan contains provisions relating to the administration of that Plan (Exhibit 2, pp. 76-79). Paragraph 9.6 thereof provides that:

"The Corporation may:

"(a) Appoint an Administrator of the Plan who shall perform functions required of an Administrator under the Employee Retirement Income Security Act as well as those properly delegated to him by the Corporation . . . ."

14. By an intra-company memorandum dated March 27, 1975 (Exhibit 3), Norman Pacun, Vice President, Secretary and General Counsel of Crane Co., who was also Assistant Secretary of and counsel to CF&I, announced the appointment of Vincent G. Galvin ("Galvin"), an employee of CF&I, as Plan Administrator of all pension, benefit and welfare plans of Crane Co. and its subsidiaries, including CF&I, effective April 1, 1975. This document was not sent to plaintiffs.

15. Form EBS-1, Plan Description, for the Non-Contributory Plan (Exhibit 4), in which Galvin was named as Plan Administrator, was prepared at Galvin's office at 300 Park Avenue, New York, New York, and was filed with the Department of Labor on or about May 26, 1976.

16. A notice dated May 28, 1976 (Exhibit 5) from F.J. Slater, President of CF&I, announced that Galvin had been appointed Administrator of all employee benefit plans for Crane Co. and its subsidiaries, including

CF&I. This notice was sent to all participants of the Master Plan, but was not sent to participants of the Non-Contributory Plan.

17. Form EBS-1, Plan Description for the Master Plan (Exhibit 6), in which Galvin was named as Plan Administrator, was prepared at Galvin's aforementioned office in New York, and was filed with the Department of Labor on or about June 21, 1976.

18. Form 5500, Annual Report for 1975, for the Non-Contributory Plan (Exhibit 7), in which Galvin was named as Plan Administrator, was prepared at Galvin's aforementioned office in New York and was filed with the Internal Revenue Service Center at Holtsville, New York on or about October 14, 1976 and with the Department of Labor on or about December 7, 1976.

19. Form 5500, Annual Report for 1975 for the Master Plan (Exhibit 8), in which Galvin was named as Plan Administrator, was prepared at Galvin's aforementioned office in New York and was filed with the Internal Revenue Service Center at Holtsville, New York on or about October 14, 1976 and with the Department of Labor on or about December 7, 1976.

20. CF&I's applications for approval by the Internal Revenue Service of the respective amendments to the Non-Contributory Plan and the Master Plan, effective January 1, 1976, were prepared by Galvin at his aforementioned office in New York and were filed on December 28, 1976 with the Chief, Employee Plans—Exempt Organizations Division of Internal

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

Revenue Service, 120 Church Street, New York, New York, CF&I withdrew these applications by letter dated July 20, 1977.

21. The Summary Annual Report for 1975 for the Non-Contributory Plan (Exhibit 9), in which Galvin was named as Plan Administrator, was prepared at Galvin's aforementioned office in New York and was distributed to participants of that Plan, including plaintiffs, on or about February 15, 1977. At the direction of Galvin, this document was mailed to the participants of that Plan, including plaintiffs, at their residences by Marine Midland from its office in either New York or Buffalo, together with their pension checks.

22. The Summary Annual Report for 1975 for the Master Plan (Exhibit 10), in which Galvin was named as Plan Administrator, was prepared at Galvin's aforementioned office in New York and was distributed at his direction to participants of that Plan on or about February 15, 1977. This document was not sent to plaintiffs.

23. By an intra-company memorandum dated June 6, 1977 (Exhibit 11), J.W. Gagliano, Controller of CF&I, announced the retirement of Galvin and the appointment of L.E. Hegstrom ("Hegstrom"), an employee of CF&I, and its Manager of Corporate Procedures and Employee Benefits since April 1, 1975, as Plan Administrator for all pension, benefit and welfare plans of CF&I and its subsidiaries, effective June 1, 1977. This document was not sent to plaintiffs.

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

24. Form 5500, Annual Report for 1976, for the Non-Contributory Plan (Exhibit 12) in which Hegstrom was named as Plan Administrator in place of Galvin, was prepared in Hegstrom's office in Pueblo, Colorado, and was filed with the Internal Revenue Service Center at Holtsville, New York and the Department of Labor on or about September 13, 1977.

25. Form 5500, Annual Report for 1976, for the Master Plan (Exhibit 13), in which Hegstrom was named as Plan Administrator in place of Galvin, was prepared in Hegstrom's office in Pueblo, Colorado and was filed with the Internal Revenue Service Center at Holtsville, New York and the Department of Labor on or about September 13, 1977.

26. The Summary Annual Report for 1976 for the Non-Contributory Plan (Exhibit 14), in which Hegstrom was named as Plan Administrator, was prepared in Hegstrom's office in Pueblo, Colorado and was distributed to participants of that Plan, including plaintiffs, on or about September 30, 1977. At the direction of Hegstrom, this document was mailed to the participants of that Plan, including plaintiffs, at their residences by Marine Midland from its offices in either New York or Buffalo, together with their pension checks.

27. The Summary Annual Report for 1976 for the Master Plan (Exhibit 15), in which Hegstrom was named as Plan Administrator, was prepared in Hegstrom's office in Pueblo, Colorado and was distributed at his direction to participants of that Plan on or about September 30, 1977. This document was not sent to plaintiffs.

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

28. A Summary Plan Description for the Non-Contributory Plan, in which Hegstrom was named as Plan Administrator, was prepared in Hegstrom's office in Pueblo, Colorado, and was mailed at his direction from Pueblo, Colorado to participants of that Plan who were represented by the United Steelworkers of America (Exhibit 16) and to all other participants, including plaintiffs (Exhibit 17), on or about November 18, 1977, and was received by plaintiffs at their residences after that date.

29. A Summary Plan Description for the Master Plan, in which Hegstrom was named as Plan Administrator, was prepared in Hegstrom's office in Pueblo, Colorado and was distributed at his direction to participants of that Plan who were represented by the United Steelworkers of America (Exhibit 18) and to all other participants (Exhibit 19), on or after November 16, 1977. This document was not sent to plaintiffs.

30. By a letter dated March 2, 1977, to Galvin, care of Crane Co., 300 Park Avenue, New York, New York (Exhibit 20), counsel for plaintiffs requested certain documents and information and stated, inter alia, "It is our understanding that you are the Plan Administrator of the CF&I pension plans." By letter dated March 14, 1977, Galvin replied thereto (Exhibit 20A).

31. By a letter dated September 1, 1977 (Exhibit 21), Robert J. Singleton, Esquire, attorney for Crane Co., advised counsel for plaintiffs, inter alia, that Galvin had retired from CF&I and that Hegstrom was the new Administrator of employee benefit plans for CF&I.

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

32. From January 1, 1971 until June 30, 1974, Galvin was a Manager of Industrial Relations, and his office was located at Roebling, New Jersey. From July 1, 1974 until March 31, 1975, he was Manager of Corporate Procedures and Employee Benefits of CF&I, and his office was located at 215 Canal Street, Pueblo, Colorado. From April 1, 1975 until his retirement on May 31, 1977, he was Administrator of all employee pension, welfare and benefit plans of Crane Co. and its subsidiaries, including CF&I, and his office was located at 300 Park Avenue, New York, New York.

33. From May, 1976 until the present time, CF&I has carried on certain operations relating to all of its employee benefit plans, including the Non-Contributory Plan and the Master Plan, at its building located at 225 Canal Street, Pueblo, Colorado. During this period, all records relating to the Non-Contributory Plan and the Master Plan have been kept and maintained at that office. Prior to May, 1976, except as set forth in paragraph 34 hereof, the aforementioned records were kept and maintained first at CF&I's principal office in Denver, Colorado and later at its principal office at 215 Canal Street, Pueblo, Colorado. The functions with respect to the Non-Contributory Plan and the Master Plan performed by CF&I at Denver and Pueblo, as set forth in paragraphs 36 and 37 hereof, were and are preformed at these offices. Certain information relating to the employment of the participants of each of the Plans is also located at the offices of the actuary and the trustee.

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

34. From 1952 until June 30, 1974, except for the period from 1968 to 1971, the records referred to in paragraph 35 hereof relating to the Non-Contributory Plan, which are now in Colorado, were kept and maintained at the offices in Roebling, New Jersey.

35. From 1952 until June 30, 1974, except for the period from 1968 to 1971, the following functions with respect to the Non-Contributory Plan were performed by the following entities or persons at the following locations:

(a) Since October 1, 1967, the trustee (Marine Midland) has received and deposited contributions to that Plan, invested the assets of that Plan, paid expenses of the trust and paid benefits under that Plan from its offices in Buffalo, and New York, New York. From at least 1960 until September 30, 1967, First Pennsylvania was the trustee, and it performed those functions at Philadelphia, Pennsylvania.

(b) CF&I maintained the records of the participants of that Plan, received claims for benefits under that Plan, determined eligibility for claimants for benefits, determined the amount of benefits, made determinations on appeals of claim denials and authorized payment of benefits at its offices in Roebling, New Jersey.

(c) Prior to 1969, the investment policy for that Plan was determined in Denver, Colorado. Since 1969, the investment policy for that Plan was and is determined in New York, New York.

(d) The Pension Board for that Plan and the members thereof were located at the offices at Roebling, New Jersey. From January 1, 1971 until June 30, 1974, Galvin was Chairman of the Pension Board.

36. From 1968 until 1971 and from July 1, 1974 to the present, the following functions with respect to the Non-Contributory Plan were and are performed by the following entities or persons at the following locations:

(a) The trustee (Marine Midland) has performed the same functions from the same places as set forth in paragraph 34 hereof.

(b) CF&I has maintained records of the participants of that Plan, received claims for benefits under that Plan, determined eligibility of claimants for benefits, determined benefit amounts, made determinations on appeals of claim denials, and authorized payment of benefits at Pueblo, Colorado, except that from 1968 until January 1, 1971, those functions were performed at Denver, Colorado.

(c) The Pension Board for that Plan and the members thereof were located at Denver, Colorado until January 1, 1971 and have been located at Pueblo, Colorado since July 1, 1974. Since August 18, 1975, Robert B. Breen has been Chairman of the Pension Board for that Plan.

(d) Since 1969, the investment policy for that Plan has been determined in New York, New York.

37. From March 1, 1950 until the present, the functions described in paragraph 39 below have been performed for the Master Plan by the same entities or

persons and from the same locations as set forth in that paragraph, except that prior to 1969, investment policy was determined by CF&I in Denver, Colorado. Since August 10, 1973, Robert B. Breen has been Chairman of the Pension Board for the Master Plan.

38. Since at least July 1, 1974, the audit and examination of the Non-Contributory Plan and the Master Plan, respectively, have been conducted by the independent accounting firm of Haskins & Sells through its office in Colorado Springs, Colorado, and the reports thereof have been kept at 215 and 225 Canal Street, Pueblo, Colorado and at 300 Park Avenue, New York, New York.

39. Since at least July 1, 1974, until August 31, 1978, actuarial reports relating to the Non-Contributory Plan and to the Master Plan, respectively, have been prepared by the independent firm of Alexander & Alexander, Inc. through its offices in New York, New York, and these reports have been kept at 215 and 225 Canal Street, Pueblo, Colorado and at 300 Park Avenue, New York, New York. Beginning September 1, 1978, the independent firm of Frank B. Hall & Co. Inc., which has its offices in New York, New York, has replaced Alexander & Alexander Inc. as the actuary for the Non-Contributory Plan and for the Master Plan.

40. Mellon Bank, as the trustee of each of the trusts forming a part of the Non-Contributory Plan and of the Master Plan, respectively, has possession of all of the assets of each of the trusts.

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

41. The Master Plan and the Non-Contributory Plan were administered separately. IRS Determination Letters, Department of Labor Reports, Actuarial Studies, and Auditors' Reports distinguished between each plan and were submitted on behalf of each plan separately.

42. CF&I pension documents and the filing system have always respected the separate identity of the plans. Separate color coded folders have been utilized, and numerical and alphabetical identification codes distinguish members of each administrative plan. Transfer from one plan to the other was only by formal action of the General Pension Board affected after full consideration of the individual situation involved. There was no automatic approval (DX 152).

43. Separate trust accounts are maintained. The Pension Boards, at the inception of the Plans, were different. Later, some overlap in membership did occur, but it was limited to executive members and is insignificant.

44. The terms of each plan were set forth in separate booklets which were distributed to employees covered by the respective plans.

45. From about 1954 to June 30, 1974, the terms and conditions of the Non-Contributory Plan and the Master Plan were substantially the same with respect to eligibility, amount of pension benefit, methods of payment of pensions, determination of service and the settlement of disputes. For the relevant years, there was both industry-wide and plant level bargaining in the steel

industry. CF&I was included as the smallest of ten - twelve steel companies that responded to the general demands of The United States Steelworkers of America ("USWA"). The USWA always bargained for pension benefits on behalf of its current members and retirees but the retirees were not included in the pension agreements. CF&I granted increased benefits for current union retirees by separate letter as permissive rather than mandatory. The master labor agreements between the USWA and the Coordinating Committee of larger steelmakers served as a guide to the entire industry. CF&I and the affiliated locals in New Jersey and Colorado used this master agreement as the framework for the terms of the pension plans for union employees in each location. When the Roeblin plant was in operation, the union workers were represented by a local of the USWA.

46. After the acquisition of Roebling by CF&I, CF&I favored this plan, but the Roebling local decided that it did not desire to participate in the CF&I pension plan for union employees, because it believed the Roebling plan was better in a few details regarding the determination of benefits. As a result, CF&I negotiated with the Roebling local of USWA individually and kept the Non-Contributory Plan as a separate plan for those non-union employees located at Roebling facilities. In general, employees under the Non-Contributory Plan were given the same benefits as those negotiated by the Roebling local of the USWA.

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

47. The practice of CF&I had been to treat all non-union employees the same as union employees with respect to employment benefits, such as savings plans, insurance plans, medical and hospital plans, vacations, holidays, severance pay and pensions. Thus, the terms of the union pension plans were usually extended to non-union employees by resolution of the Board of Directors of CF&I.

48. All changes and amendments to the Non-Contributory Plan and the Master Plan before June 30, 1974 were the same. When the Master Plan was amended in 1954, 1957, 1960, 1962, 1964, 1966, 1969, and 1972, the same Amendments were made to the Non-Contributory Plan.

49. When increases in pension benefits were granted to retired persons under the Master Plan in 1960, 1966, 1969, and 1972, the same increases in pension benefits were granted to retired persons under the Non-Contributory Plan.

50. The corresponding increases in benefits in those years were the result of voluntary action by CF&I in order to reflect those increases in union pension fund benefits obtained by the Colorado and New Jersey locals of USWA through collective bargaining.

51. CF&I amended the Master Plan three times after June 30, 1974, and increased pension benefits payable to pensioners thereunder. However, after June 30, 1974, when Roebling manufacturing operations terminated, the benefits payable to the Roebling retirees under the Non-Contributory Plan were not increased.

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

52. CF&I established and maintained an employee welfare benefit plan entitled "Program of Insurance Benefits for Employees of CF&I Steel Corporation Outside of Collective Bargaining Units" (PIB" herein) for its employees. CF&I is the plan sponsor of PIB under the provisions of ERISA.

53. CF&I distributed from time to time to its non-union employees, including the plaintiffs, various documents and booklets explaining the benefits of PIB. Plaintiffs were all participants of the PIB.

54. The PIB plan for non-union employees in New Jersey was not identical to the PIB plan applicable to non-union employees outside New Jersey.

55. When the PIB was amended after June 1, 1974 to increase life insurance, medical and hospital insurance benefits for certain pensioners, such amendments and increased benefits were not granted to plaintiffs.

56. Effective August 1, 1975, CF&I amended the PIB to provide members of the Master Plan medical care insurance benefits at no cost to retirees. This benefit was provided to pensioners already retired under the Master Plan but was not provided the plaintiffs retired under the Non-Contributory Plan.

57. After CF&I closed its Roebling operations in 1974, no further negotiations were conducted with the Roebling local of USWA. CF&I informed Roebling representatives that negotiations with them would not be conducted in Colorado, and that officials of CF&I located in the East would conduct negotiations if the union wished to do so. The Roebling local never negotiated

with CF&I in 1974, or any year thereafter, with respect to pensions. No increase in union benefits having been negotiated, there was no corresponding increase in benefits for non-union employees covered by the Non-Contributory Plan.

58. The Roebling division also had a contributory pension plan. This plan was established prior to the acquisition of Roebling by CF&I. One hundred nine of the plaintiffs were members of this plan and received benefits from it, in addition to those benefits received under the Non-Contributory Plan. The Master Plan did not have such a contributory plan associated with it. Employees of CF&I other than those originally employed by the Roebling Division prior to 1962 were restricted to the Master Plan.

59. CF&I and its parent company, Crane Co., had very large unfunded accrued pension liabilities which have been steadily increasing.

60. CF&I transferred six (6) non-union employees from the Non-Contributory Plan to the Master Plan in May, 1974, shortly before the closing of the Roebling Plant. The six employees are E. F. Lord, W. Deas, W. H. Greenlee, A. L. Schwager, E. Bodine, and G. Bertani.

61. Both Lord and Bertani began their employment with CF&I at a location other than the Roebling Division and, pursuant to long-standing administrative policy, should have been placed in the Master Plan originally; their transfer was to correct an administrative error.

62. The remaining individuals were transferred to the Master Plan because they were hired at a Roebling Division, but continued employment with CF&I after the shutdown of the Roebling Division.

63. On March 21, 1975, the company transferred J. P. Pilger from the Non-Contributory Plan to the Master Plan; Mr. Pilger remained active in Colorado after the closing of the Roebling Division as one of the top officers of the company.

64. Two of the plaintiffs, Harry Leopold, Jr. and Matthew E. Stirling, were tranferred by CF&I facilities in Colorado prior to July 1, 1974, but were not transferred from the Non-Contributory Plan to the Master Plan.

65. Leopold and Stirling were not transferred to the Master Plan because they were transferred to CF&I Colorado facilities prior to the closing of the Roebling Division and retired before 1974 when the Roebling operations ceased.

66. Shortly after the Roebling operations ceased at the end of 1974, all members of the Non-Contributory Plan were former employees of Roebling who had already retired; some members of the Master Plan were retired, but current non-union employees were also covered by the Master Plan. No member of the Non-Contributory Plan was still working when this suit was instituted.

67. In June 1974, plaintiff Turner spoke to Galvin and requested the same benefits for Non-Contributory Plan members as for those in the Master Plan because, in his view, there was only one Company and the plan

members should receive identical benefits where they worked together at the same locale. When Turner expressed these strongly held beliefs, no promises or representations were made by Galvin. There is insufficient evidence of promises or representations that equal benefits would be paid by the company on any other occasion.

68. Some Non-Contributory Plan members did not understand that there was a difference between their plan and the Master Plan, and expected former Roebling employees to be treated the same as all other former non-union employees.

69. Because Non-Contributory Plan members were all Roebling employees prior to 1962 who had retired prior to the closing of Roebling, New Jersey facilities in 1954, more of them have continued to live on the East Coast in their retirement years. More of the Master Plan members worked for CF&I in Colorado and some of the retired plan members still reside in and around Pueblo, Colorado, where the CF&I executive offices and Pension Board members perform their duties.

Discussion

The national pension policy embodied in §302(c)(5) of the LMRA, 29 U.S.C. §186(c)(5), in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1001 et seq., and in the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub.L. 96-364, 94 Stat. 1295, 29 U.S.C.A. §§1132a et seq. (1976-81 Supp.), confers statutory rights on beneficiaries of pension funds. This is so whether the beneficiary contributes to the plan (contributory plan) or the plan is

funded exclusively by the employer (non-contributory plan). Although these rights originate in the private contract between union and employer, Congress has chosen to give them considerably more protection than the traditional state-law action for breach of contract would afford.

While the plaintiffs rely solely on the applicable provisions of ERISA, the Supreme Court has recognized that "ERISA essentially codified the strict fiduciary standards that a §302(c)(5) trustee must meet." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 332 (1981). The Taft-Hartley provisions parallel the ERISA provisions and trustees must meet the requirement of each. See *Hurn v. Retirement Fund Trust Etc. of S.D. Calif.*, 703 F.2d 386, 391 (9th Cir. 1983) (citing inter alia, *UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982)). Under the fiduciary provisions of §4021 of ERISA, 29 U.S.C. §1104(a)(1), the trustees must discharge their duties with respect to the plan "solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan." *See Music v. Western Con. of Team. Pen. Trust Fund*, 712 F.2d 413, 418 (9th Cir. 1983). The labor law provisions of ERISA provide a system of safeguards designed to strengthen private employee pension and welfare benefit plans. ERISA does not require an employer to offer any type of benefit, but, if it does so, the plan must comply with the minimum requirements of the Act. See *Sutton v. Weirton Steel P.2 of Nat. Steel Corp.*, 567 F. Supp. 1184, 1195 (N.D.W.Va. 1983).

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

The plaintiffs contend the Master Plan and Non-Contributory Plan are in fact a single plan and that by increasing health and welfare benefits for retirees under the Master Plan, but not the Non-Contributory Plan, defendants violated their fiduciary obligations under 29 U.S.C. of 1104(a)(1). Furthermore, plaintiffs argue that defendants are equitably estopped from discriminating against the plaintiff group in determining benefits. Defendants, on the other hand, assert the Plans are separate entities, so that the trustees are under no legal obligation to provide a uniform increase in benefits to participants in both plans.[2]

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[2] Because this case does not directly involve pension provisions which were the product of collective bargaining, we do not find UMWA Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982), dispositive. In *Robinson*, the Court stated that the "sole and exclusive benefit" provision of §302(c)(5) "is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents to the exclusion of all others." *Id.* at 570. In holding that §302(c)(5) did not authorize federal courts to review the eligibility rules of pension plans developed first by collective bargaining under a rule of reasonableness, the Court distinguished those cases where the changes in benefits were made unilaterally by the trustees of the fund. *Id.* at 573. The standard of review in cases where the trustees determine the eligibility rules is whether such actions are arbitrary and capricious. See *Music*, supra, 712 F.2d at 417; *Hurn*, supra, 703 F.2d at 389; Sellers v. O'Connell, 701 F.2d 575, 577 (6th Cir. 1983); Elser v. I.A.M. Nat. Pension Fund, 684 F.2d 648, 653 (9th Cir. 1982). In employing this rule, however, the rationale of the *Robinson* court is instructive. The Court noted that "there is no general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness. This is no less true when potential beneficiaries subject to discriminatory treatment are not members of the bargaining unit. . ." 455 U.S. at 574. Like its counterpart under the LMRA, we cannot discern that §1104(a)(1) of ERISA imposes a stringent reasonableness requirement.

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

After thorough review of the testimony and documentary evidence in this case, it appears that the plans, although substantially identical for many years, were and are nevertheless separate and independent entities. The Master Plan was not established until March 1, 1950, two years before CF&I acquired Roebling and almost twenty years after Roebling had established its Non-Contributory Plan. The independent administration of each plan establishes its individuality. There are IRS determination documents, reports to the Department of Labor, audits and actuarial studies of each of the two plans. The administration of the plans also demonstrates their independence. Individual trust accounts, pension booklets and pension records have been maintained. There was also a separate and distinct Pension Board for each plan. This is not to deny overlapping or similarities in structure to make their administration more efficient. But efficiencies in administration do not eliminate their separate identities and merge them into one de facto Plan.

The similarity in plan coverage and benefits and the equality of benefit increases in past years was a function of industrywide collective bargaining with the United Steelworkers of America (USWA). After 1974, the union successfully negotiated to increase certain benefits of union members and retirees under the jurisdiction of the Pueblo, Colorado local of the USWA; CF&I voluntarily increased benefits to both active and retired participants in the non-union Master Plan correspondingly. Because the Roebling plant closed in 1974, CF&I no longer negotiated with the New Jersey locals of the USWA; there were no active non-union members of the Roebling

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

Non-Contributory Plan and Roebling union retirees received no corresponding increases in benefits after the closing of the Roebling facilities.

The plaintiffs' claim that certain employees were erroneously classified in the Master Plan and certain employees transferred to the Master Plan after 1974 did not accomplish a merger of the plans. The coverage of the Master Plan has consistently applied to all employees who were not originally hired at the Roebling New Jersey facility prior to June 30, 1962. Two individuals transferred to the Master Plan after 1974 were erroneously classified originally. The four others transferred were employed by CF&I after the Roebling plant closed and all other Non-Contributory Plan members were retired. Plaintiffs Stirling and Leopold were transferred to facilities other than the Roebling Division, but both of them retired and were already on pensions before the 1974 closing of the Roebling Division. These transfers do not destroy the separateness of the plans.

Because the plans are separate entities, the plaintiffs' claim of disparate treatment necessarily fails. Trustees empowered with the administration of an employee pension trust are vested with wide discretion to protect the fiscal soundness of the plan. Plaintiffs' argument is a claim that the trustees should exercise this discretion to increase benefits due under their particular plan. Absent some contractual duty, whatever the emotional appeal of such an argument, no statute compels such an obligation.

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

It is clear that vested benefits may not be forfeited (except as provided by 29 U.S.C. §1053), but this is not a case where the trustees have amended a pension plan to deprive employees of vested benefits retroactively. See, e.g., *Harm v. Bay Area Piper Trades Pen. Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir. 1983) (citing additional examples),[3] *Elser, supra*, 684 F.2d at 657. No pension entitlement has been reduced in amount; post retirement increases granted pensioners in a different plan have not been awarded. No vested benefits are involved.

Increases or beneficial changes in hospital and life insurance to former employees retired under the Master Plan, but not to employees retired under the Non-Contributory Plan, are not in violation of ERISA. Medical and life insurance are ancillary benefits which may be forfeited without violating ERISA. See *Sutton v. Weirton Steel*, supra, 567 F. Supp. at 1196. The statutory history makes clear that only an accrued benefit is non-forfeitable and an accrued benefit refers to a pension or retirement not ancillary benefits. *Petralla v. NL Industries*, 529 F. Supp. 1357, 1365-66 (D.N.J. 1982). Since these benefits do not vest and, if provided, could be removed, there is no compulsion to provide them and no cause of action for their deprivation.

Even assuming that the plans are one and the same, awarding benefits to one class of employees and not another does not of itself constitute a violation of the trustees' fiduciary duty. See *Toensing v. Brown*, 528

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[3] *Winpinsinger v. Aurora Corp.*, 456 F. Supp. 559 (N.D. Ohio, 1978), relied on by the plaintiffs, is a case where the plan amendment acted to divest certain employees of vested benefits. Its precedential value is, therefore, *de minimus*.

F.2d 68, 71 (9th Cir. 1975) (trustees duties under §302 of the LMRA); *Harris v. Lockheed Aircraft Corp.*, 572 F.2d 138, 140 (6th Cir. 1978). "[P]referential effect alone does not constitute a violation of §404(a)." *Petralla*, supra, 529 F. Supp. at 1367; *Fine v. Semet*, 514 F. Supp. 34, 44 (S.D. Fla. 1981), *aff'd*, 699 F.2d 1091 (11th Cir. 1983). It is well established in this[4] and other circuits[5] that such decisions by trustees of pension trusts must be sustained unless arbitrary or capricious. The defendant's actions, while perhaps not those the court would have taken, have some rational relationship to the purposes of the plans and are not arbitrary or capricious. Fiscal demands and the need for fiscal soundness of a Non-Contributory Plan are valid considerations governing trustees' actions. The preferred treatment of active and retired Master Plan members complained of resulted from the strength of the labor movement in the area where CF&I plants are still in operation not just because more Master Plan members walk the streets of Pueblo where CF&I executives live and work. The increase in benefits to non-union labor to equal the union collective bargaining agreements in the operative divisions where union negotiations continue reflects business considerations that cannot be said to be irrational.

Finally, we find no merit to plaintiffs' claim that promissory estoppel dictates that any benefit increases to beneficiaries of one plan must be accorded to

[4] Rosen v. Hotel and Restaurant Employees and Bartenders Union of Phila., 637 F.2d 592, 596 n.5 (3rd Cir.), cert. denied, 102 S.Ct. 398 (1981).

[5] Stacey v. Coombs, 671 F.2d 602, 606 (D.C. Cir. 1982); Brug v. Pension Plan, 669 F.2d 570, 578-79 (9th Cir. 1982); Palino v. Casey, 664 F.2d 854 (1st Cir. 1981); Riley v. MEBA Pension Trust, 570 F.2d 406, 412 (2nd Cir. 1977).

beneficiaries of the other. There is no evidence of representations of fact by any defendant that it would provide uniform benefits. It appears that the Roebling plaintiffs expected that their benefits always would be the same as other non-union employees of CF&I, and felt strongly that it was unfair to treat former Roebling Division employees differently. But that expectation, even though reasonable, cannot support a claim of estoppel without some representation by the defendant. See *Rosen v. Hotel & Restaurant Employees*, supra, 637 F.2d at 597. Cf., *Anthony v. Ryder Truck Lines Inc.*, 611 F.2d 944 (3rd Cir. 1979) (holding that a claim for pension benefits under a theory of estoppel was viable where there were affirmative misrepresentations by the trustees).[6]

Maloney alleges that his benefits were reduced in retaliation for actions taken while pursuing his ERISA rights in this suit. It is not disputed that the amount of Maloney's benefits was increased and then reduced in 1976, but the record reflects that an administrative error caused an overpayment and corresponding corrective reduction in benefits. This error was discovered after a general audit and the overpayment to Maloney ceased. Thus, we find no intentional interference with plaintiff Maloney's ERISA rights.

To the extent findings are set forth in the discussion herein which were not set forth in the Court's previous opinion or the findings of fact *infra*, they are specifically adopted as if expressly made.

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[6] Most courts have rejected the invitation to use estoppel principles to sustain a claim for pension benefits. See Reihenzer v. Shannon, 581 F.2d 1266, 1267 n.1 (7th Cir. 1978). To accept plaintiffs' broad estoppel theory would undermine the "written agreement" requirement of 29 U.S.C. §186(c)(5)(B).

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

CONCLUSIONS OF LAW

1. This court has subject matter jurisdiction under 29 U.S.C. §1132(a) & (c).

2. The Court has personal jurisdiction over the defendants. Slip Op. at 11-13.

3. Venue is proper in this district as to all defendants under 29 U.S.C. §1132(e)(2). Slip. Op. at 6-13.

4. The defendants were properly served under 29 U.S.C. §1132(d)(1).

5. Plaintiff has failed to demonstrate that the Master Plan and the Non-Contributory Plan are in fact one Pension Plan.

6. Plaintiff has failed to prove that defendants breached the fiduciary duty provisions of ERISA, 29 U.S.C. §1104(a)(1), or any other obligation imposed by law.

7. Plaintiffs have failed to prove the elements of detrimental reliance or promissory estoppel in order to give rise to an equitable duty to increase benefits under the Non-Contributory Plan to the same level as those under the Master Plan.

8. Plaintiff, Maloney, has failed to prove any unlawful interference with his protected ERISA rights.

9. Judgment will be entered in favor of the defendants and against the plaintiffs.

NORMA L. SHAPIRO
Norma L. Shapiro, *J.*

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

ORDER

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

JACK A. TURNER, *et al.*,

vs.

CF&I STEEL CORPORATION and NON-CONTRIBUTORY PENSION PLAN OF CF&I STEEL CORPORATION and THE PENSION PLAN OF CF&I STEEL CORPORATION.

Civil Action No. 77-3916.

AND NOW, this 9th day of January, 1984, in accordance with the court's Findings of Fact and Conclusions of Law, it is ORDERED that judgment is entered in favor of defendant CF&I on Counts I and II and in favor of all defendants on Count V; by reason of the disposition of these counts, Count IV is DISMISSED as MOOT.

BY THE COURT:
NORMA L. SHAPIRO
NORMA L. SHAPIRO, *J.*

Appendix B—United States District Court for the Eastern District of Pennsylvania's Findings of Fact, Conclusions of Law and Orders dated January 9, 1984.

AMENDED ORDER UNDER FEDERAL RULE OF CIVIL PROCEDURE 60A.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania
(Filed Jan 26 1984)

JACK A. TURNER, *et al.*,

vs.

CF&I STEEL CORPORATION and NON-CONTRIBUTORY PENSION PLAN OF CF&I STEEL CORPORATION and THE PENSION PLAN OF CF&I STEEL CORPORATION and PROGRAM OF INSURANCE BENEFITS FOR EMPLOYEES OF CF&I STEEL CORPORATION OUTSIDE OF COLLECTIVE BARGAINING UNITS.

Civil Action No. 77-3916.

AND NOW, this 25th day of January, 1984, it is hereby ordered that this court's Order of January 9, 1984 is CORRECTED to the extent stated herein and it is FURTHER ORDERED that Judgment is entered in accordance with the court's Findings of Fact and Conclusions of Law in favor of all defendants on Counts I, III (as amended) and V; by reason of the disposition of these Counts, Count IV is DISMISSED as moot.

NORMA L. SHAPIRO
J.

Entered: 1/27/84
Clerk of Court

APPENDIX C

Opinion of the United States Court of Appeals for the Third Circuit (1985)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1057* & 84-1072

JACK A. TURNER, NORMA L. ABBOTT, DOROTHY Y. ADAMS, STEPHEN A. AGOES, BERNARD ALLEGRETTI, BLANCHE A. ALLEN, ADAM ANDEL, JR., PHILIP A. ANDERSON, OLIVE V. APPLEGATE, MICHAEL BACHIK, WILLIAM J. BALLA, CHARLES G. BENNIGHOFF, JR., HERBERT W. BERGLUND, BLAIR BIRDSALL, JOHN W. BLAKESLEE, JOSEPH J. BODNAR, R. GARRETT BOETSMA, CATHERINE A. BOLAND, LOUIS BOLDIZAR, EDWIN P. BOYER, C. LEE BOYLE, JR., WILLIAM F. BREZA, CHARLES J. BRIEL, JR., ARTHUR BRODOWSKI, EDWARD H. BROWER, HARRY E. BROWN, JR., H. RUSSELL BROWN, JOSEPH A. BRUNI, ALTON M. BUCHANAN, CHARLES H. BURDEN, FRANK BUREK, EDWARD L. BURKHARDT, MARIE K. BURKHARDT, FRED BURKLEY, JR., FOREST S. BURTCH, SILVIO F. CAPRITTI, RAYMOND A. CARTY, RICHARD F. CAZIN, LOIS M. CLAYTON, GROVER B. CLOSSON, MARGARET D. COUTIER,

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* The appeal in 84-1057 is dismissed because it was taken from a January 9, 1984 order, which was superseded by an amended order on January 25, 1984.

HOMER DELORME, JAMES J. DENNION, III, KINSEY S. DICKEL, LORETTA DiLULLO, PHILIP F. DiPAOLA, RITA T. DiPAOLA, JOHN A. DYOTT, EDWARD W. EGAN, RUTH C. EGAN, PAUL ENGLUND, HENRY PAUL EVANS, ANTHONY A. FARKAS, A. BEATRICE FORD, STANLEY FORS, JEAN FRASCELLA, JOHN L. FRATTICCIOLI, FREDERICK A. FRENCH, RICHARD H. FRIDINGER, HERBERT C. FUES, SR., WILLIAM C. FUNK, EVERETT K. GILBERT, HOWARD J. GODFREY, CHARLES C. GOLDENBAUM, RUTH M. GRAINGER, EMMA P. GREEN, WALTER F. GUTERMUTH, MYRTLE W. HAMPTON, WILLIAM K. HANNA, STELLA M. HARBOURT, JAMES E. HARPER, WALTER H. HARTMANN, G. KNIGHT HAYES, ANTHONY P. HIEL, EMMA M. HENDERSON, GERTRUDE M. HENRY, JOHN M. HERRMANN, RUDOLF H. HERTZOG, LLOYD E. HILL, HAROLD W. HILLS, SR., WALTER S. HOECHST, MARY K. HOFFMAN, JOSEPH HORESKO, JOSEPH G. HOTTINGER, CHARLES JACOBS, STEPHEN KATALA, ALEXANDER A. KERR, NAOMI L. KERR, JOHN H. KESSLER, MARY J. KILLILEA, EUGENE KING, ALEXANDER KISH, MADELINE C. KOENIG, HAROLD L. KOMOSKI, MARY FLORA KONDASH, FRANKLIN LeMUNYON, HARRY LEOPOLD, JR., DARTREY LEWIS, FRED M. LINDA, ROBERT J. MacDANIEL, MARGARET MAGYAR, NICHOLAS L. MAGYAR, JOHN MAJOROS, MARGARET M. MALONE, HOWARD E. MALONEY, NORMA C. MARJARUM, JULIUS MATE, JR., GREGORY J. McDERMOTT, WALTER W. McDERMOTT, ALEXANDER D.

McDOWALL, WILLIAM G. McGOUGH, ALFRED F. MEGER, JOSEPH MEGULES, ANASTAZIA S. MELVILLE, HAROLD MILLER, JR., ALFRED MORGAN, WILLIAM J. NAY, ELIZABETH C. NEMETH, JOHN E. NIXON, M. JOSEPH OLAFSON, CHARLES E. PALMER, CHRISTIAN L. PATRICK, A. LESTER PATTERSON, LeROY H. PATTERSON, WILLIAM L. PATTERSON, STEPHEN PENTEK, FRANCIS O. PERRY, DONALD R. PETTY, THOMAS G. PIERSON, WILLIAM PITKO, MALCOLM POLLOCK, H. KENT PRESTON, P. PAUL RANTO, SR., HERBERT D. RATHBUN, JOHN F. REED, ELLA G. REEGER, LOUISE T. REESE, PAUL B. REISINGER, FRANK J. RESCH, WILLIAM C. RIDGE, CHESTON B. ROBBINS, LEON ROHRBACHER, JOHN SABO, JR., CHESTER A. SAJESKI, ANDREW E. SARY, EDGAR W. SCHINDEWOLF, JOHN W. SCHLEGEL, JR., RUDOLPH K. SCHLEGEL, LENA SCHMELTZ, ALBERT J. SCHULZ, ALBERT E. SCHUNDER, ANNA M. SEIDENGLANZ, RADER J. SEYLER, HELEN R. SMITH, CLARENCE W. SNYDER, STEPHEN R. SOPKO, GRACE M. SORTER, WILLIAM H. SPENCER, EMIL H. SPILLMAN, STEVEN V. SPIRITO, PAUL H. STARK, ALICE P. STEVENS, MATTHEW E. STIRLING, JAMES P. SZATHMARY, ISAAC I. TANTUM, STANLEY E. TANTUM, CHARLOTTE D. TOTH, PAUL S. TOTH, ROBERT F. TYRRELL, F. TITUS UPDIKE, WILLIAM VITO VASTI, JEAN C. VERNON, ERMA VOORHEES, IRVING C. WALL, KENNETH R. WARRACK, GEORGE WASKO, ROSEMARY M. WEBER, WALTER F. WEBER, EMERSON V. WILKINS, IRMA M. WILSON, PETER F. WILWOL, MELVIN B. WINNER, HARRY P. WOLFINGER,

Appendix C—Opinion of the United States Court of Appeals for the Third Circuit (1985).

FRANK A. YEAGER, M. DORIS ZAHORSKI, ELIZABETH C. NEMETH, Executrix of Estate of Joseph R. Nemeth and individually as surviving spouse, HELEN POTKAY, Executrix of Estate of JOSEPH F. POTKAY and individually as surviving spouse, JULIA RESCH, Executrix of Estate of Stefan Resch and individually as surviving spouse, and EDITH YAEGER, Executrix of Estate of Otto Yaeger, Jr. and individually as surviving spouse, THOMAS BARRY, Personal Representative of Francis Barry, Deceased, ADELMA I. BLYTHE, surviving spouse of J. Gardner Blythe, Deceased, MARGARET E. BORDEN, Individually in her own right and as surviving spouse of Richard W. Borden, Deceased, DOROTHY BURKHAUSER, Individually in her own right and as surviving spouse of Valentine C. Burkhauser, Deceased, LEWIS PARKER, Personal Representative of Frederick G. Cartlidge, Deceased, EDITH C. DAWSON, Personal Representative of Alfreda Craft, Deceased, MRS. JAMES BARRETT, Personal Representative of Anne C. Engemann, Deceased, MARTHA E. THOMAS, Personal Representative of Marie A. Farley, Deceased, BARBARA FERRANTE, Individually in her own right and as surviving spouse of Joseph M. Ferrante, Deceased, HAROLD G. HARTMAN, Personal Representative of E. George Hartmann, Deceased and HELEN M. HARTMANN, Individually and in her own right as surviving spouse of E. George Hartmann, Deceased, DOUGLAS GUYER, Personal Representative of C. Richard Hill, Deceased, SYLVIA HOLLENBECK, Surviving Spouse of Luther G. Hollenbeck, Deceased, NEW JERSEY NATIONAL BANK, Personal Representative of Herbert S. Hunt, Deceased, HELEN

Appendix C—Opinion of the United States Court of Appeals for the Third Circuit (1985).

L. KERR, Individually in her own right and as surviving spouse of Earl S. Kerr, Deceased, HELEN LEX, Individually in her own right and as surviving spouse of W. Irving Lex, JEAN M. McCOY, Surviving spouse of John J. McCoy, Deceased, ROBERT MEYEREND, Personal Representative of Frank M. Meyerend, Deceased, JACK NOBLE, Personal Representative of J. Henry Noble, Sr., Deceased, JANET PACENTA, Surviving spouse of Daniel Pacenta, Deceased, MARY PAGLIONE, Individually in her own right and as surviving spouse of Pasquale R. Paglione, Deceased, WANDA G. ROBISON, Individually in her own right and as surviving spouse of Frank P. Robison, Deceased, FRANCES BRODOWSKI, Individually in her own right and as surviving spouse of Leon W. Brodowski, Deceased.

Appellants,

vs.

CF & I STEEL CORPORATION
and
NON-CONTRIBUTORY PENSION PLAN OF CF & I STEEL CORPORATION
and
THE PENSION PLAN OF CF & I STEEL CORPORATION
and
PROGRAM OF INSURANCE BENEFITS FOR EMPLOYEES OF CF & I STEEL CORPORATION OUTSIDE OF COLLECTIVE BARGAINING UNITS.

Appendix C—Opinion of the United States Court of Appeals for the Third Circuit (1985).

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civ. No. 77-3916)

Argued June 10, 1985
Before: WEIS, GARTH and STAPLETON,
Circuit Judges
Filed August 14, 1985

Harry C. Barbin, Esq. (ARGUED)
Barbin, Lauffer & O'Connell
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Attorney for Appellants

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M. Norman Goldberger, Esq.
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Attorneys for Appellees

Appendix C—Opinion of the United States Court of Appeals for the Third Circuit (1985).

OPINION OF THE COURT

WEIS, *Circuit Judge.*

Although a number of factual issues have been raised in this ERISA case, plaintiffs pose a significant legal question—whether they are entitled to a jury trial. In agreement with the district court, we conclude that in this suit against a plan trustee for pension benefits, the beneficiaries do not have the right to a jury trial.

This case comes to us after a bench trial in which the district court found that plaintiffs were not entitled to additional pension benefits and entered judgment for defendants. Plaintiffs appealed.

Plaintiffs are retired nonunion employees of defendant C.F. & I. Steel Corporation. They are presently receiving benefits under the non-contributory "Roebling Plan," one of two retirement programs maintained by the company. Their principal contention is that they should be receiving the same post-retirement benefits that are provided to employees who retired under the "Master Plan."

The existence of two pension plans came about as the result of a merger. C.F. & I. established its Master Plan in 1950. In 1952, the company acquired the stock of John A. Roebling Sons Corp. and it became a division of C.F. & I. Roebling had its own retirement plan which had been in operation for many years and it continued after the merger.

Membership in the two plans was mutually exclusive. All employees hired by the Roebling Division before June 30, 1962 were included in the Roebling non-contributory plan. All other employees of C.F. & I. participated in the Master Plan.

From 1954 to June 30, 1974, the terms of the Roebling Plan and the Master Plan were substantially the same with respect to eligibility, amount and method of benefit payments, determination of service, and settlement of disputes. Even though C.F. & I. negotiated terms of a pension plan with the union local at the Roebling Division separately, the company made a practice of granting the nonunion employees under the Roebling Plan the same benefits granted to members of the union. This procedure was followed until 1974 and had the effect of providing participants in the Roebling Plan approximately the same benefits as those who were under the Master Plan.

In 1974, the company shut down the Roebling Division and laid off the employees. When collective bargaining negotiations with the local union ceased, no increased benefits were provided under the Roebling Plan. The Fund did however continue to pay pensions as provided in 1974.

C.F. & I.'s operations at other sites continued, and the company and the local union maintained their collective bargaining relationship at those plants. As result of union negotiations, the company provided additional benefits to participants and retirees under the Master Plan. The company, however, denied the plaintiffs' request for similar increases to retirees of the Roebling Division.

Appendix C—Opinion of the United States Court of Appeals for the Third Circuit (1985).

Plaintiffs filed this suit in the district court, alleging that after the acquisition of Roebling, C.F. & I. merged the two pension funds and treated them as one. Plaintiffs argue the company was arbitrary and capricious in granting additional benefits to retirees under the Master Plan while denying similar increases to participants of the Roebling Plan. Plaintiffs allege that therefore the company and the trustees of pension plans were in violation of ERISA.

The district court denied the plaintiffs' request for a jury trial and dismissed two counts of the complaint preliminarily. After a bench trial, the court found that the two plans had not been consolidated but had been maintained as separate entities. In support of its findings, the court observed that each of the plans sent its own reports to the Department of Labor and each filed individual tax returns. The actuarial and audit reports for each plan were different, and separate filing systems were utilized. Though there was some overlap, each plan had its own distinct pension board. IRS determination letters were submitted individually for each plan. Pension documents and filing systems always reflected the separate identities of the plans.

Although a few employees were transferred from the Roebling Plan to the Master Plan after 1974, the court determined that because the transferees continued to work for C.F. & I. the reassignments were justified and did not act to merge the plans. Having determined that the plans were separate entities, the court decided that the plaintiffs' "claim of disparate treatment necessarily fails."

The district court also held that the plaintiffs' claims against C.F. & I. for failure to furnish certain documents under §502(c) of ERISA, 29 U.S.C. §1132(c), could not succeed. The court found that C.F. & I. had appointed Vincent G. Galvin as administrator of the pension plans, that plaintiffs were aware of his appointment, and that they should have directed their inquiries to him rather than the company.

On appeal, plaintiffs contend that the court erred in striking the demand for a jury trial and in finding that there were separate plans. Plaintiffs also assert error in the court's failure to hold that defendants were estopped from asserting the existence of separate plans; to assess the statutory penalty for the non-production of requested documents and to find that reduction of benefits to one pensioner, Howard E. Maloney, constituted unlawful interference with rights protected by ERISA.[1]

With the exception of the jury trial demand, the issues posed on appeal are primarily factual. The plaintiffs' case rests basically on their contention that there was but one retirement plan. The district court, however, determined that the two plans were separate. This finding is not clearly erroneous. Indeed, on this record, particularly the documentary evidence, any other finding would lack adequate support. In addition, we conclude that plaintiffs have not made out a case of estoppel and have

[1] The plaintiffs also complain of the district court's tardiness in filing its findings of fact and conclusions of law. Although this case could have been handled with more dispatch, we find no prejudice that requires reversal.

not established any infringement of Maloney's statutory rights. Likewise, plaintiffs' claims for statutory penalty must also fail. A stipulation between the parties reveal that counsel were aware that Vincent G. Galvin rather than C.F. & I. was the plan administrator.

We turn then to the question whether plaintiffs were entitled to a jury trial. Although the issue has been addressed by several other Courts of Appeals, this is a case of first impression in this court.

ERISA itself does not make any provision for a jury trial, and the sparse legislative history is not enlightening. Section 502(a) of the Act, 29 U.S.C. §1132(a), grants a variety of remedies for enforcement of statutory rights. Subsection (a)(3) permits a participant, beneficiary or fiduciary to obtain an injunction against practices which violate the Act, to enforce ERISA or the terms of a plan, or to obtain other equitable relief. Jurisdiction over these cases is restricted to the federal courts. By its terms the relief available under this subsection is equitable and consequently no jury trial is available.

Subsection (a)(1)(B) provides that a civil action may be brought by a participant or beneficiary to recover benefits, to enforce rights under a plan, or to clarify rights to future benefits. State and federal courts are given concurrent jurisdiction over suits brought under this subsection.

Suits brought under subsection (a)(1)(B) are not categorized as equitable as are those under subsection (a)(3). A survey of the case law, however, reveals that most cases brought under subsection (a)(1)(B) do not

involve disputed factual matters. Most often the question is whether the trustees or plan administrators properly exercised discretion in denying or setting the level of benefits to a participant or beneficiary, an issue more appropriately resolved by the court. The nature of most controversies under subsection (a)(1)(B), therefore, does not lend itself comfortably to the traditional jury trial.

The Courts of Appeals have almost uniformly agreed that jury trials are not available to resolve claims of the type presented here. In *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981), the question was whether the trustees had properly determined the plaintiff's employment status. Noting that the remedies under §502(a)(1)(B) had their origin in the law of trust, the court interpreted congressional silence on the right to a jury trial as reflecting "an intention that suits for pension benefits by disappointed applicants are equitable." *Id.* at 829. In addition, the limited scope of review over a trustee's decision, "bespeaks a legislative scheme granting initial discretionary decision-making to bodies other than the federal courts, with which federal jury trials have proved incompatible." *Id.* at 830.[2]

Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980), adopted *Wardle's* reasoning and held that lacking any clear congressional intent the court should be guided by

[2] The Court of Appeals for the Seventh Circuit has distinguished *Wardle* from *Bugher v. Feightner*, 722 F.2d 1356 (7th Cir. 1983) (a suit by trustees of a pension fund against the employer for delinquent contributions). The *Bugher* factual situation and jurisdictional basis are quite different from those presented in the case at hand and consequently that opinion is not pertinent.

previous cases which considered such claims by pension beneficiaries as equitable. To the same effect see *Berry v. Ciba-Geigy Corporation*, _____ F.2d _____, No. 84-1473 (4th Cir. May 13, 1985); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984); *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982).

The Court of Appeals for the Second Circuit has held that jury trials are not available under subsection (a)(1)(B). *Katsaros v. Cody*, 744 F.2d 270 (2d Cir. 1984), *cert. denied*, _____ U.S. _____, 105 S.Ct. 565 (1984). Originally, that court had affirmed without published opinion a district court's decision which had concluded that a jury trial should be provided in a case where a beneficiary alleged breach of fiduciary duty by the trustee. *Pollock v. Castrovinci*, 476 F.Supp. 606 (S.D.N.Y. 1979), *aff'd.* 622 F.2d 575 (2d Cir. 1980). In explicitly refusing to follow the *Pollock* ruling, the *Katsaros* panel stated that the beneficiaries were not entitled to a jury trial in a suit filed against the trustees of a pension plan. The Court of Appeals explained that the jury trial issue in *Pollock* had become moot by later developments and therefore was not a matter considered in the earlier appeal. *See also The Right to a Jury Trial in Enforcement Actions under Section 502(a)(1)(B) of ERISA*, 96 Harv. L. Rev. 737 (1983). *Cf. Peckham v. Board of Trustees*, 653 F.2d 424, 426 n.3 (10th Cir. 1981).

Although we have not had the occasion to rule on the jury trial issue within the confines of ERISA, we did have a similar issue presented in *Nedd v. United Mineworkers of America*, 556 F.2d 190 (3d Cir. 1977). In that case, pensioners brought an action under §301 of the LMRA against the trustees of a pension plan and a

union for failure to pursue delinquent contributions from employers. We noted, "The remedies of trust beneficiaries against trustees or third parties are equitable rather than legal. That the liability of either or both may be a matter of federal rather than state law has no bearing on the Seventh Amendment issue." *Id.* at 207.

By similar reasoning we are persuaded that the remedy plaintiffs sought in the case at hand is equitable. The Supreme Court's pronouncement in *Central States, Pension Fund v. Central Transport, Inc.*, 53 U.S.L.W. 4811 (June 19, 1985)—that the duties of plan trustees are to be examined under the common law of trusts—supports our conclusion that only equitable relief is available under §502(a)(1)(B) of ERISA.

We therefore find ourselves in agreement with the other Courts of Appeals which have held that no jury trial is required in suits under §502(a)(1)(B) by a beneficiary or participant against a trustee.

Finding no error in the district court's determinations, we will affirm its judgment.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX D

District Court's Trial Memorandum

December 22, 1983

MEMORANDUM

TO: Judge Shapiro

FROM: Nick Harbist

RE: Turner v. CF&I

Plaintiffs are former non-union employees of CF&I who were employed at facilities of the Ro(e)k(b)ling Division on or before June 30, 1962 and are covered under what is known as the "Non-Contributory Pension Plan." After the Ro(e)k(b)ling facilities closed in 1974, certain increases in health and welfare pension benefits were granted to certain retired employees covered under a different plan (Master Plan) but were not granted to the plaintiffs.

Plaintiffs claim (1) the discri(m)inatory increase in benefits to retirees under the Master Plan violated ERISA, 29 U.S.C. §1104(a)(1) (fiduciary duties section); and (2) plaintiff's relied to their detriment on statements of CF&I that they would be similarly treated.

Opinions

I. *Judgment for Defendant*

A. The Plans involved in this case were separate and distinct in Administration and Structure. The reason that other non-union retirees were given increases in benefits is that the union retirees collectively bargained for such increases in the locations where CF&I still is still operational. Because the Ro(e)k(b)ling Division is not operational, there was no occasion to increase either union or non-union benefits.

Thus, because the Plans are separate entities, there is no requirement under the law that the benefits must be increased uniformly.

B. Even if the Plans are so intertwined to be construed as one Plan, the standard upon which the Trustees' actions is to be judged is arbitrary and capricious. *Rosen v. Hotel Etc.*, 637 F.2d 592, 596 n.5 (3d Cir.), *cert. denied*, 102 S.Ct. 398 (1981). The plaintiffs' right to vested benefits has not been altered. Only the ancillary benefits have been increased to other individuals. Because health and welfare benefits are not vested within the meaning of ERISA and may be forfeited, it seems that grant or increase in this type of benefits to one group and denying it to others is not unreasonable considering the operational justification (function of collective bargaining). Moreover, the fiscal soundness of the Plan is another factor to be given great weight.

II. Judgment for Plaintiffs

A. *Arbitrary and Capricious*—we could analogize to the §302 cases and say that the plaintiffs have shown discriminatory practi_es and defendant has not come forward with sufficient justification for its actions. But the decision here was discretionary designed to help one group of retirees by providing health and welfare benefits. The Trustees could do so only after considering the assets in the different plans available to defray this cost.

B. There are insufficient facts in the record to demonstrate detrimental reliance.

Thus, even giving plaintiffs every inference, a decision holding the differential increase in benefits irrational is speculative at best and would most probably be reversed.

mfw

APPENDIX E

Constitution of the United States, Seventh Amendment

AMENDMENT VII: Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX F

The Employee Retirement Income Security Act Section 501(a)

Statute 29 U.S.C. §1132(a)

§1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS §1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS §1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

APPENDIX F

The Employee Retirement Income Security Act Section 501(c)

Statute 29 U.S.C. §1132(c)

(c) Administrator's refusal to supply requested information. Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.